REGINA VS. ASHWELL.[1]

Criminal law is not an exact but an experimental science. Nearly all crimes have certain common elements, but they can not be made to conform to any logical or pre-established system for the very good reason that to a great extent each crime has its own distinct history and requirements. The assembled parts of the criminal law make a structure not altogether satisfactory to the modern legal architect.

Failure to recognize the real character and history of the criminal law has led many legal writers into grave errors. They have too often assumed that a rule or principle existed because it ought to, and in their haste to make a perfect system have modified established definitions of crimes by the application of general principles of moral conduct in a manner and to an extent not sanctioned by authority.

This process is most strongly exemplified in connection with the crime of larceny as Mr. Beale has so well shown in his article on "The Borderland of Larceny."[2] This crime, looked at from the purely historical standpoint, is extremely simple in its definition and requirements. It is the taking from the possession of another, and into the thief's possession, and thereafter carrying away a chattel without the consent of the possessor. This, of course, must be done with a certain fraudulent intent, the nature of which it is not now necessary to discuss.

If the chattel is in no one's possession there can be no larceny, for instance, where it is abandoned.[3] And if the thief does not get possession there is no more than an attempt.

There must, in short, be an actual, a true act of trespass, and this trespass must be a *total assumption* of possession and not a mere *interjerence* with possession. The taking and the intent must concur in time.[4] It follows that if the possession is gotten at one time and the intention to convert is formed at a later time, there is no larceny.[5] In fact our embezzlement statutes were

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[1] (1885) 16 Cox C. C. 1.

[2] 6 Harv. Law Rev. 244.

[3] Reg. *v.* Hehir (1895) 29 Irish L. T. 323; Reg. *v.* Clinton (1869) Ir. Rep. 4 C. L. 6—Taking seaweed thrown up on prosecutor's land not larceny.

[4] Reg. *v.* Thurborn (1849) 1 Den. C. C. 387.

[5] Bazely's Case (1799) Leach C. C. (4th Ed.) 835.

enacted because of this. It is true that there are occasional suggestions of an exception where the original possession was gained wrongfully. We find this view set forth in *State* v. *Coombs*.[1] But that case is not sanctioned or supported by the authorities it cites and lays down a rule difficult if not impossible to apply. It says that if the original possession was "tortious" a subsequent conversion may be larceny. Now a trespass is a tort, and one who has taken possession without actual right to do so is a trespasser and has "tortious" possession. If he commits larceny when he forms the intent to steal later, cases like *Reg.* v. *Thurborn*[2] must be regarded as overruled, and the rule that the act and the intent must concur is no longer applicable. It may still be applicable if the "act" is no longer required to be a *trespass* but may, instead, be a *subsequent conversion.* No authority can be found saying that there has been a change of this character in the primary definition of the crime. Such a change may be desirable, but it has not been made and it can be made only by legislative enactment. Even the anomalous doctrine of larceny by trick requires that the taking of possession must concur in time with the intent to steal.

Another theory, which, unlike the "tortious possession" theory, seems to lack any judicial sanction whatever, is what might be called the excusable possession theory. According to this view, one who has possession of a chattel, under circumstances which prevent his being civilly liable for having such possession, may become a thief by subsequently misappropriating it. This theory is open to the same objections as the last. It substitutes another act of larceny for the one historically established, a conversion for a trespass. Larceny is concerned only with the taking of possession in the first place, and not at all with any subsequent wrongdoing or with the responsibilities of possession. Doing what one ought not do with a possession already gained may be wrong and even criminal, but it is not larceny.[3]

According to the orthodox definition of larceny, if Ashwell, in the principal case, did not have the intent to steal when he got possession of the coin, he is not guilty of larceny. We know when he formed his intention. If he got possession before that time he is not guilty.

Sir Frederick Pollock suggests a solution of the case which at

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[1] (1867) 55 Maine 477.
[2] (1849) 1 Den. C. C. 387.
[3] Reg. *v.* Flowers (1886) L. R. 16 Q. B. D. 643.

least has the merit of uniqueness, and which is not altogether unsupported by the reasoning in the cases.[1]

According to his view Keogh and Ashwell agreed to pass a shilling. There was no *consensus ad idem* as to anything but a shilling and no consent by Keogh to pass possession independent of property. That is, in the minds of both, possession was but an incident of property. Therefore if Ashwell got a possession, it was not a possession by consent. If actual it was therefore tortious and, by the doctrine of continuing trespass, a subsequent misappropriation made him a thief.

This solution is of course assailable in its last step, for a continuing trespass against personal property in the *possession* of the trespasser seems an impossibility, unless by trespass, in larceny, we mean a trespass on the case. A continuing trespass is possible only where the trespasser has not taken possession of the chattel but continues to interfere with the possession of the complainant. The moment the possession is taken from the claimant by the wrongdoer the trespass is complete and can not longer continue except as a completed fact.

But let us turn to the first step in his argument. There was no meeting of the minds as to anything but the shilling he says. This is true if we consider their agreement independent of their acts. Keogh promised to give Ashwell a shilling if Ashwell would promise to return an equal amount later. As a matter of actual contract it is perhaps not accurate to say that Keogh made any such promise. Then let us say instead that Ashwell made an offer to Keogh to enter into a unilateral contract, which was to consist of an act on the part of Keogh—handing over a shilling—and a promise by Ashwell—to pay it back. In either event the contract is with reference to a shilling. In the case of the unilateral offer the words used would show the contract which followed upon Keogh's performing.

Neither party necessarily had his mind fixed on a particular shilling, and the handing over of a *shilling* was necessary to the existence of an obligation *under that contract* to do what Ashwell promised. Suppose the agreement were to keep the shilling in a particular way and by mistake Keogh handed over a sovereign. He later attempts to sue Ashwell on the contract for not keeping the coin received in the specified way. Ashwell has a good defense to the action on the contract as no shilling was ever given

[1] Pollock and Wright on Possession, 101 *et seq.*, and Mr. Justice Wright's view of this case at p. 210 *et seq.*

him and Keogh must recover by another form of action. No contract such as they contemplated ever arose because Keogh never performed the condition precedent to the existence of such an obligation—the delivery of a shilling. Or, if the contract was bilateral, he never performed his promise, which was precedent to an obligation to perform on the part of Ashwell.

Clearly then, Pollock is right when he says that their minds never met as to the sovereign, that is, never met in *contract* to pass the property in a sovereign. But does it follow that no possession passed by consent or at all? Could not Ashwell maintain trespass against some one who took the sovereign from him?

It seems to me that the contract they entered into or attempted to enter into had no connection with that which they did do in fact. They agreed to do one thing and actually did another. This is clearly shown thus: If the shilling had been one of peculiar value and Keogh had promised to deliver it but had turned over a sovereign instead, he could not plead performance to a suit for specific performance. The two things are entirely separate and the rights arising from one transaction do not necessarily depend on the circumstances of the other.

Pollock's statement that there was no consent that possession should pass except as an incident to property, proves only that no possession of the *shilling* passed, for that was the only thing with reference to which there was even a semblance of a contract or intention to pass property.

So far we have considered the case independent of the physical acts done by the parties, and have not solved the difficulty about the manner in which Ashwell got possession of the sovereign. This solution depends on considerations other than those mentioned by Pollock.

We know that Keogh did a certain act, that of his own volition he handed a coin over to Ashwell. If passing of possession was a consequence of this act there was no larceny, for Ashwell had no intention to steal at that time. It may be said that no possession passed because there was a mistake. A man who does an act through mistake nevertheless does it. To say that he does not do the act because he made a mistake as to its real nature, is to confuse that which he might have wanted to do with that which he actually did do. If a man who is mistaken as to the nature of an act caused by him and physically performed by him does not do that act, who does? A man may consent to a thing as a fact, although if he had known what the real nature of the thing consented to was, he would never have done so.

Now what did they do? First, as to passing title to the sovereign. Title may be passed by contract or by gift. We have seen that there was no contract to pass a sovereign. It might be argued that the contract took the form of a sale, that Keogh sold the particular coin he held in his hand for Ashwell's promise to pay that coin or its equivalent back. But such was not the fact. There was no agreement as to that particular piece of metal in fact, although such an agreement might well have been made.[1]

Nor was there a gift, for, although there was a delivery, there was no intention to make a gift.

It would seem then that the title to the sovereign did not pass to Ashwell. Pollock conclusively shows that no title passed by contract. (p. 102.) Keener says that the title passes when all the formalities necessary for a transfer have been complied with, such as delivery, etc.[2] But it is probable that he refers to a case where the mistake is as to an inducing cause of the transfer and not as to the very nature of the thing transferred. In fact he excepts the very similar case of mistake as to the identity of the person to whom the money is paid.

But *possession* does not necessarily depend on title and Ashwell might well have the one without the other. *Title* is concerned with the "internal" connection of the owner with his property. It is the ultimate right to exclude others from the use of that property. It is not actual dominion but the right to dominion.[3]

Possession, on the other hand, is an external characteristic of property. It may be said to consist in the power to act as the independent dominus for any space of time, coupled with a presumable intention to do so in case of need.[4] It may exist independently of title and can be transferred where title is not. Thus, in the case mentioned by Keener, where money is paid by mistake to the wrong person that person gets possession although he has no title.

In shorter form possession may be termed control with intention to exclude. This leaves open the question of the quantum of both control and intent. While Keogh had the sovereign, that control could manifest itself only over the piece of metal which he held in his hand and which was worth a sovereign. And the intent to exclude could apply only to the coin itself. His physical

[1] Wood *v.* Boynton (1885) 64 Wis. 265.

[2] Keener on Quasi-Contracts 63.

[3] Houston *v.* Farris (1882) 71 Ala. 570, Pratt *v.* Fountain (1884) 73 Ga. 261, Joy *v.* Stump (1887) 14 Ore. 361, Ga. Civ. Code (1895) § 3208.

[4] Stephen's Dig. Cr. Law 428.

precautions for retaining control were necessarily directed toward the object in his hand, merely as an object, as a coin, a piece of metal. The presence in his mind of a mistaken belief concerning the *value* of the object in his hand did not in the least affect the fact of possession on his part, for value is a quality only and can not be the subject of possession. If Keogh were ignorant of the fact that he had a sovereign on his person at all, he would undoubtedly have possession of that sovereign when he took it out of his pocket, even though he thought it a shilling. That is, he would have possession of the piece of metal, of the coin.

When Keogh handed this coin over he intentionally gave up the power of control over that specific coin. He also voluntarily gave up his intent to exclude Ashwell from that coin. He no longer had an intent to exclude anyone from *that* coin. If he had known the value of the coin he would not have done this, but the very form of this statement presupposes that he did do it. He has voluntarily parted with all that constitutes possession unless we are in error as to what is possession.

And why has he parted with it? Simply to allow Ashwell to assume the very same attitude toward that coin that he had himself a moment before. If this attitude now assumed by Ashwell is not possession, Keogh did not have possession. If it is possession, Ashwell has gotten it by consent and can not be guilty of larceny.

It is urged in answer to this that Ashwell can not get possession, that is, he can not have the requisite intent to exclude until he learns what it is he is to exclude others from. It is said that until he does know, the requisite quantum or rather quality of intention on his part is lacking. And, as a further assumption, it is said that Keogh can never lose possession until someone else gets it, as the law abhors a vacant possession. (Just why the law should do so is not clear; it seems to look with equanimity on the case of abandoned chattels.) Following this line of reasoning out it is said that Ashwell gets or "takes" possession when he learns the real nature of what he has. This is an attempt to assimilate this case to cases of finding, but the analogy fails for the very good reason that Ashwell "finds," not an article, but that he has made a mistake. If this is a "taking" of the coin, it is, as Lord Campbell points out in *Reg.* v. *Preston*,[1] nothing more than a "mental larceny." If Ashwell can be convicted for this, why may he not be convicted for simply coveting his neighbors' goods. It might be

[1] (1851) 5 Cox C. C. 390.

said that he performed a new act of manual control of the coin at the moment he learned the real value. Whether he did or not does not determine whether he had possession before that time or not. If he did have possession before the time he learned it was a sovereign it becomes immaterial whether or not he performed an act of "manual control" at a later time, for larceny is the "taking" of possession and not the manipulation of a possession already gained.

Now, can it be said that Ashwell did not have possession at all until he learned the real nature and characteristics of the coin he had put in his pocket? Or to present the identical problem in another form: if I go to my neighbor across the hall to borrow Volume 10 of the California Reports and he gives me Volume 11 by mistake and I carry this book home before discovering the error, can it be said that I do not have possession until I discover the error? In other words, does possession require a certain or even tolerably certain knowledge of the real character of the article held? And if it does require a knowledge of the character and qualities and value of the article, when shall this requirement be regarded as satisfied? Must the alleged possessor know the chemical and physical constituents of the chattel to the last degree, or is there a practical "working knowledge" short of that extreme? One who finds an article may get possession of it the moment he decides to exclude every one else from it even though he has an exceedingly vague notion as to what it is. He knows that it is a tangible object and his attention is directed toward the object he sees or feels and not toward any special quality or value of that object. This is shown particularly well in the cases of *Reg.* v. *Thurborn*[1] and *Keron* v. *Cashman*.[2] In the latter case some boys found an old rag ball that contained paper money. They threw it from one to the other and it finally broke open disclosing the money. The court held that it was in the possession of them all, as no one of them had formed a definite intent to exclude the others from the ball, but that if any one of them had done so before the ball broke open he would have had possession of the ball and its contents.

In fact no case can be cited where more is required for possession than physical control and intent aimed at a tangible object. If more were required, a carrier, whose liability is based on possession, could never be held for the loss of goods unless he knew their

[1] (1849) 1 Den. C. C. 387.
[2] (N. J., 1896) 33 Atl. 1055.

exact nature. The contrary is too well established to require citation of authority.

Suppose that Keogh and Ashwell both knew that the coin was a sovereign but both supposed that it contained ten per cent. of alloy, while in fact it contained twelve, can it be said that Ashwell would never get possession until he learned just how much alloy it did contain? Or shall we go as far as Pollock does and say that there never can be a consensual possession until their minds meet on the real character of the coin. If so, unless Keogh and Ashwell both know the exact weight and make-up of the coin, the mine from which the metal came and its every other characteristic, they never can consent to the passing of possession. Nor would Keogh's attempted consent avail if Ashwell's mind did not have exactly the same picture of the coin as that of Keogh, both pictures being accurate to the minutest degree.

The law does not require this or anything remotely approaching it. It is satisfied if control exists over an object; and if that control has, added to it, an intent to exclude others from dominion over the object, there is a true possession. In short, possession deals, as was stated at the outset, with externals only. Ashwell then got possession the moment he got the coin in his hand, for then he intended to exercise exclusive dominion over it. And Keogh voluntarily placed the coin in his hand, intending that his own control should cease and that of Ashwell begin. If this is not a case of parting with possession by consent there can be none.

Regina v. *Ashwell* was decided by an evenly divided court, and therefore is not an authority either way. The very next year the same court in the case of *Reg.* v. *Flowers*[1] decided, under a state of facts that can not be distinguished from those in the principal case, that the defendant was not guilty. It is true the court attempted to distinguish the two cases, but this attempt is only half hearted. In this country there is very little authority on the point. The case of *State* v. *Ducker* in Oregon,[2] lends some support to the view that Ashwell was guilty, but that is such a poorly considered case that it can have little weight as an authority. The leading case in this country is the case of *Comm.* v. *Cooper*,[3] which holds, after a careful review of the authorities, that facts, similar to those in the principal case, do not constitute larceny.

CHAS. R. LEWERS.

RENO, NEVADA.

[1] (1886) 16 Cox C. C. 33. [2] (1880) 8 Ore. 394.
[3] (Ky., 1901) 52 L. R. A. 136, and note.